REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 43 OF 2017

BAKERY, CONFECTIONERY, FOOD MANUFACTURING

AND ALLIED WORKERS UNION.....CLAIMANT

VERSUS

UNITED MILLERS LIMITED.....RESPONDENT

(Before Hon. Lady Justice Maureen Onyango)

JUDGMENT

The claimant herein is a trade union registered under the Labour Relations Act. The respondent is a limited liability company registered under the Companies Act and is engaged in food manufacturing in Kisumu and other parts of the country.

The parties have a valid recognition agreement signed on 4th September 2006. The parties thereafter negotiated and signed the first collective bargaining agreement (CBA) on 2nd November, 2007. The CBA was effective from 1st May 2007 and covered a period of two years expiring on 30th April 2009. The parties have since negotiated several CBA's with the last one (as at the time of filing the dispute herein) being the CBA covering the period 1st May 2009 to 30th April 2011.

The issue in dispute is the interpretation of clause 5(2) of the CBA.

Background

Sometime between 2008 and 2010, the claimant reported several disputes

against the respondent to the Minister for Labour concerning termination of employment of its members as follows:

1. Trade Dispute No. ML/IR/49/23/2008; in respect of George Amutamwa and John Maleya

2. Trade Dispute No. ML/IR/49/29/2009; in respect of Rafael Owiyo and Patrick Maibei; and

3. Trade Dispute No. ML/IR/49/18/20108; in respect of Charles Wambua, Evans Milure, Noah Ambale, Simon Otieno, Timothy Litukai and Joshua O. Ogunda.

The disputes were resolved following discussions between the parties after conciliation failed. However, the parties again failed to agree on interpretation of Clause 5(2) for purposes of tabulation of the terminal dues, thus compelling the claimant to report a dispute on the same by its letter dated 20th February 2016. In the letter the union cited the issue in dispute as:

> "*Interpretation of Clause 5(2) of the Collective Agreement in respect payment of terminal benefits more particularly the computation of service pay, due to unionisable employees*."

The dispute was accepted for conciliation under Section 65(1) of the Labour Relations Act and Ms. Hellen Maneno of Kisumu County Labour Office appointed as conciliator.

After hearing the parties and considering their written submissions, Ms. Maneno made the following findings and recommendations: -

> *"Section 35 (5) of the Employment Act 2007 provides for payment of gratuity to an employee whose services have been terminated. However, the provision further states that where an employee is a member of a gratuity or service pay scheme established under a collective agreement, or the National Social Security Fund, a registered pension, then the Section shall not apply to that employee. The Employment Act Chapter 226 Laws of Kenya which was repealed when the Employment Act 2007 came into force did not have a provision for gratuity. It is my opinion that the gratuity or service pay cannot be applied retrospectively. Any consideration for gratuity should be effected from the date of the commencement of the Act.*
>
> ***RECOMMENDATION***
>
> *From the findings above, I recommend that the provisions of Clause 5 (2) be implemented from the date the Collective Agreement came into effect i.e. 1st May 2007. The service for the years prior to the Collective Agreement is catered for through the NSSF contribution by the employer.*
>
> *I further urge the parties to consider the above recommendation in very good faith as a basis for settlement of this dispute."*

The claimant was aggrieved by the recommendations of the conciliator and filed the instant claim.

In view of the nature of the issue in dispute, the same was by consent of the parties disposed of by way of written submissions.

Claimant's Submissions

The claimant submits that the stature underpinning for payment of service pay is Section 35(5) of the Employment Act, 2007 which states –

> **35(5) An employee whose contract of service has been terminated under subsection (1)(c) shall be entitled to service pay for every year worked, the terms of which shall be fixed.**

The claimant submits that the said benefits were negotiated and framed under Section 5(b)(2)(i) of the CBA to the effect that service pay shall be based on fifteen (15) days' pay for **each completed year of service**. (Emphasis by the claimant). It is submitted that the clause is self-explanatory, that sub clauses (ii) and (iii) were inserted later to protect the interests of both the claimant and the respondent in so far as implementation of sub-clause (i) is concerned. That the concerns sought to be addressed by sub-clauses (ii) and (iii) was the mass resignation of employees who would then seek payment of the benefit. That the 2 year window was intended to address this mischief.

The claimant submits that sub-clause (iii) was on the other hand intended to protect the interest of employees by providing that the respondent would not cause termination of all employees' services during the life of the CBA with the intention of depriving the employees of terminal benefits under sub-clause (i).

The claimant submits that before the collective agreement was executed the terms of employment governing terms and conditions of service of the employees was the individual contracts of each employee. That by dint of Section 59(d) of the Labour Relations Act the terms of the collective agreement are incorporated into the contract of every employee. That although by virtue of Section 59(5) the collective agreement comes into force upon registration, the agreement does not interrupt the continuity of service.

The claimant relied on the decision of Rika J. in the case of ***Tailors and Textiles Workers Union –V- Wild Elegance (2016) eKLR*** in which he observed that-

> *"The fact that the CBA came into effect after some of the employees had started working does not negate that the employees served continuously from the dates of their respective employment."*

The claimant submits that there is nothing in the collective agreement that deprives the employees of their accrued years of service prior to the effective date of the agreement. That the sub-clause presupposes and recognises the accrued years of service prior to execution of the same. That the clause recognises the number of years an employee has dedicated to the service of the employer.

The claimant further submits that payment of NSSF for the years of service prior to the execution of the CBA does no deprive the employees of the benefit under the CBA relying on the decision of Rika J. in ***Elijah Kipkoros Tonus –V- Ngara Politicians T/A Bright Eyes Limited (2014) eKLR*** in which he held as follows –

> *"Basic membership to the National Security Fund or other Schemes is not in itself a bar to an employee accessing service pay under Section 35[5]. As the evidence in this Claim has shown, an employer could register an employee with the N.S.S.F, but fail to remit the monthly contributions, or remit irregularly. Secondly, the Court must look at the social security route that confers overall greater benefit on the employee. The Claimant in this dispute worked for 25 years. He was unfortunately forced to retire on medical grounds. He lost his wife, and had to take care of the family and family businesses back in his rural home. The N.S.S.F membership was not a serious social security mechanism in the eyes of the Respondent. Contributions in favour of the Claimant were remitted erratically, and after 25 years of service, there was only a tiny amount of Kshs. 52,480 in the Claimant's account."*

The claimant faulted the finding of the Minister to the effect that service pay for the years prior to the coming into effect of the CBA are catered for by NSSF for reasons that no facts or evidence was before the conciliator to demonstrate that indeed NSSF contributions were effected. Secondly, that service pay as a component of terminal benefits is payable as at the time of employee's exit hence the applicable law

is that in existence at the time of exit, and, finally, that service pay is by law based on the number of years served to the date of exit.

The claimant submitted that its interpretation is in consonance with Clause 5(i) of the CBA which reckons notice period from the date of employment and not from the date of coming into force of the CBA.

The claimant urges the court to find its interpretation to be the correct position.

Respondent's Submissions

The respondent submitted that it has been in existence (as at the time of filing suit) for 40 years and there were employees who had been in employment for over 25 years.

That the issue in dispute is the interpretation of clause 5, (b) (2) of the parties' Collective Bargaining Agreement which reads as follows:-

> *"…..Any employee terminated by the Company or who resigns...shall be paid terminal dues and benefits as follows;*
>
> *1. Dues*
>
> ……..
>
> *2. Benefits*
>
> *i. Fifteen (15) days' pay for each completed year of service based on the employee's earnings as at the date the contract terminates.*
>
> *ii. The payment of terminal benefits under paragraph (i) above shall be made to an employee who will have served the company for not less than two years from the effective date-of this agreement.*
>
> *iii. The company shall not cause termination of any employee during the life of this agreement with a view of depriving such employee payment of terminal benefits under (i) above*
>
> *iv. During the life of this agreement, any payment of terminal benefits to an employee who has not sewed the company for the period stated under (ii) above shall be at the sole discretion of the company based on circumstances and individual merit."*

It is the Respondent's submission that the above clause sets the base to be the effective date of CBA which is 1st May, 2007 and that one must have served for 2 years from the effective date to have any benefits. That it is a proper interpretation and understanding that payment of this benefit was starting on 1st May 2009 based on the effective date of 1st May, 2007.

On the disputes that were reported to the Ministry of Labour by the claimant, the respondent submits that dispute ML/IR/49/23/2008 grievant being George Amutamwa and John Maleya, these employees were dismissed on account of gross misconduct. Secondly at the time of dismissal they had not completed 2 years' service as from 1st May, 2007. Clause 5(b)(2)(i) was therefore not applicable.

That in respect of ML/IR/29/2009 the grievants being Raphael Owiyo and Patrick Maibei were dismissed in September, 2008 and they had not completed 2 years as provided for under clause 5(b), (2) (ii). The clause was therefore not applicable to them.

That in trade dispute ML/IR/49/18/2010 the claimant alleged that the affected 6 employees were declared redundant. That the applicable clauses are clause 7 and 8 of the CBA. Clause 5(b)(2) was in respect of employees who were terminated or who had resigned and not those declared redundant.

That the disputes mentioned herein above were reported to the Minister for Labour in 2008, 2009 and 2010 respectively. That no reason has been given why the claimant failed to take the matters to court after the parties disagreed on the disputes. It is the respondent's submission that the claimants knew they had no case that would stand the test of time and the claim is an abuse of the process of the court.

That after the parties disagreed on the interpretation of clause 5 (2) b, the claimant reported a trade dispute. That the Minister for Labour appointed a Conciliator who after hearing the parties come up with a report having findings and recommendations. The conciliator recommended that the effective date of clause 5(b)(i) be 1st May, 2007. The respondent agreed with this recommendation.

That the Respondent has been contributing NSSF for all its employees from the time they started operations. This means they have complied with Section 35(5) of the Employment Act, 2007. This then means that the issue of service had already been dealt with before the parties entered into a relationship and started negotiations.

Determination

The only issue for determination is the interpretation of Clause 5 of the CBA in so far as it provides for service pay. The entire Clause 5 is reproduced below –

"CLAUSE 5. TERMINATION OF EMPLOYMENT

(a) Notice

(i) After the probationary period, it shall be obligatory for both the company and the employee to give written notice of termination of employment. Such notice shall be given according to the length of service, as follows:-

- *Up to three (3) years' service - One (1) month notice.*
- *Over three (3) years and up to eight (8) years' service - Two (2) months' notice*
- *Over eight (8) years' service - Three (3) months' notice.*

(ii) The required notice under paragraph (i) above may be given in writing on any day of the month and in absence thereof, pay in lieu of notice equal to sums as would have been earned during the notice period shall be made by either party to the other.

(iii) While serving on or during the notice period, an employee shall be entitled to full benefits under this Agreement.

(b) Terminal Dues and Benefits.

Any employee who is terminated by the company or who resigns by giving proper notice shall be paid terminal dues and benefits as follows:-

1. Dues

(i) *Days worked and not paid for if any,*

(ii) *(House allowance for days worked and not paid for if any;*

(iii) *Overtime payment due if any.*

(iv) *Acting allowance if any.*

(v) *Safari/meal allowance if any.*

(vi) *Tools allowance if any.*

(vii) *(Shift allowance due if any.*

(viii) *Disturbance allowance due if any.*

(ix) *Transfer allowance if any.*

(x) *Pro-rata or accrued annual leave earned during the period of employment but not taken as at the date of termination if any.*

(xi) *Leave travelling allowance on pro-rata basis to the accrued annual leave if any.*

(xii) *All his/her contributions plus the company's surrender value or the company's contribution arising from the company run Provident Fund Scheme if any in accordance with the Retirement Benefits (Individual Retirement Benefits Schemes) Regulations 2000 if any.*

2. Benefits

(i) Fifteen (15) days' pay for each completed year of service based on the employee's earnings as at the date the contract terminates.

(ii) The payment of terminal benefits under paragraph (i) above shall be made to an employee who will have served the company for not less than two years from the effective date of this Agreement.

(iii) The company shall not cause termination of any employee during the life of this Agreement with a view of depriving such employee payment of terminal benefits under (i) above.

(iv) During the life of this Agreement, any payment of terminal benefits to an employee who has not served the company for

the period stated under (ii) above shall be at the sole discretion of the company based on circumstances and individual merit.

(c) Termination of Employment on Medical Grounds.

(i) An employee who has been certified through a medical report by a medical doctor appointed by the company to be unfit for continuing with employment on medical grounds shall be terminated and paid in accordance with the provisions of paragraphs (a) and (b) above in this Clause 5.

(ii) An employee certified under (i) above shall be at liberty to obtain his/her own medical report on the state of his/her health from a registered/ recognised medical practitioner on his/her suitability or otherwise to continue with employment.

(iii) Where medical reports differ by way of one doctor declaring the employee unfit for continued employment while the other says the opposite, the matter shall be referred to a Government Medical Board or any other Medical Board as may mutually be agreed upon by the parties to this Agreement and the findings of the Board shall be binding on both parties.

(iv) The company shall meet the cost for items (i) and (iii) above, while the employee shall meet the cost under item (ii) above."

The clause in contention is 5(2)(i) which provides that an employee who is terminated by the company or who resigns shall be entitled to fifteen (15) days' pay for each completed year of service based on the employee's earnings as at the date the contract terminates. Subsection 5(2)(ii) provides for qualifying period of 2 years effective from the date of the CBA while sub clause (ii) protects employees from termination in a manner to deprive them of the benefit.

My understanding of clause 5(2)(ii) as read with 5(2)(ii) and 5(2)(iii) is that should an employee's employment be terminated within two years of the coming into force of the CBA they will not be entitled to benefit from the service pay while if they leave service after two years from the effective date they would be entitled to the service pay for all years worked from date of employment without any further limitations as there are no other limitations except that in clause 5(2)(ii).

The effective date of the CBA was 1st May 2007. Two years from the effective date is 1st May 2009. Thus any employee who left service before 1st May 2009 would not be entitled to payment of service pay. However, any employee who left service from 1st May 2007 is entitled to payment of service pay for the entire period they were in the employment of the respondent that is from date of appointment.

The parties are directed to tabulate the terminal dues for the affected employees based on the interpretation as given herein above.

Orders accordingly.

DATED AND SIGNED AT NAIROBI ON THIS 4TH DAY OF APRIL 2019

MAUREEN ONYANGO

JUDGE

DATED AND DELIVERED AT KISUMU ON THIS 14TH DAY OF MAY 2019

MATHEWS NDERI NDUMA

JUDGE